

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 25, 2008

**JACKIE F. CURRY v. STATE OF TENNESSEE & HOWARD CARLTON,
WARDEN**

**Appeal from the Criminal Court for Johnson County
No. 5035 Robert E. Cupp, Judge**

No. E2007-02526-CCA-R3-HC - Filed August 4, 2008

A Johnson County jury convicted Petitioner of three separate counts of aggravated rape. The trial court sentenced Petitioner to three twenty-two-year sentences to be run consecutively to each other. Petitioner was unsuccessful on appeal. *State v. Jackie F. Curry*, No. E2000-02475-CCA-R3-CD, 2001 WL 872789 (Tenn. Crim. App., at Knoxville, Aug. 2, 2001), *perm. app. denied* (Tenn. Nov. 5, 2001) Petitioner filed a petition for a writ of habeas corpus. The habeas corpus court summarily dismissed the petition. Because Petitioner did not adhere to the mandatory requirements for filing a petition for writ of habeas corpus, we affirm the habeas corpus court's summary dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. C. MCLIN, JJ., joined.

Jackie F. Curry, Pro Se, Mountain City, Tennessee.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; and Joe Crumley, District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

Petitioner physically forced the victim, who was his ex-girlfriend, from a nightclub. After taking her to an Economy Inn, he raped her orally, vaginally and anally. *Jackie F. Curry*, 2001 WL 872789, at *1-3. A jury convicted Petitioner of three counts of aggravated rape. *Id.* Following a sentencing hearing, the trial court sentenced Petitioner to twenty-two years for each aggravated rape

conviction to run consecutively to each other, for an effective sentence of sixty-six years. These sentences were also ordered to run consecutively to a previously imposed eight-year sentence, for which he was on probation at the time of the incident. *Id.* at *5.

On direct appeal, Petitioner argued that the evidence was insufficient to support his conviction, the trial court erred in allowing the State to cross-examine Petitioner regarding previous convictions for sale of cocaine, and the trial court erred in ordering his sentences to run consecutively. This Court found all of Petitioner's issues to be without merit and affirmed Petitioner's convictions and sentences. *Id.* at *7.

On March 29, 2004, Petitioner filed a petition for habeas corpus relief. *Jackie F. Curry v. State*, No. E2004-01227-CCA-R3-HC, 2005 WL 927158, at *1 (Tenn. Crim. App., at Knoxville, Apr. 21, 2005). Petitioner presented the following arguments in the March 29, 2004 petition:

[H]is conviction judgments are void because the conviction court violated his due process rights by excluding evidence, the prosecutor withheld exculpatory evidence, the petitioner's trial counsel rendered ineffective assistance, the indictment violated double jeopardy principles by incorporating three counts, the convicting evidence was legally insufficient and materially varied from the offenses charged in the indictment, and the trial court erred in enhancing the petitioner's sentences and in imposing consecutive sentences.

Id. The habeas corpus court dismissed the petition. We affirmed the dismissal on appeal to this Court. *Id.*

Petitioner filed the current petition for habeas corpus relief on January 31, 2007 and later filed an amended petition on February 22, 2007. Petitioner presented the following issues to the habeas corpus court: (1) the indictments were defective because they failed to allege that force or coercion was used to accomplish the act of sexual penetration; (2) the indictments are facially void because they fail to allege that sexual penetration was accomplished without the victim's consent and that Petitioner knew he did not have the victim's consent; (3) the indictment is invalid because it fails to "state the facts constituting the offense in ordinary and concise language" so that "a person of common understanding [would] know what is intended;" (4) the trial court constructively altered the charging terms of the indictment by instructing the jury on statutory elements not included in the indictment; (5) his convictions are void because the aggravated rape statute under which he was convicted is unconstitutional; (6) the proof did not support the jury's finding that he engaged in conduct that constituted a substantial step toward the three aggravated rape convictions; and (7) the trial court did not have jurisdiction to revoke the community corrections sentence he was serving at the time of the incident.

On October 1, 2007, the habeas corpus court summarily dismissed the petition by written order. With regard to Petitioner's first five issues concerning his indictment, the habeas corpus court stated that if true, these allegations would render the judgments voidable and not void. Also, concerning the first three issues, the habeas corpus court stated that the indictments met the requirements of Tennessee Code Annotated section 40-13-702. The habeas corpus court also stated that Petitioner's due process argument in which he argued that the statute under which he was convicted was unconstitutional would at most render his conviction voidable and not void. Petitioner's sufficiency argument was summarily dismissed on the basis that an attack on the sufficiency of the evidence is not a proper basis for habeas corpus relief. Likewise, the habeas corpus court stated that an attack on a community corrections sentence is not an appropriate basis for habeas corpus relief. Petitioner filed a timely notice of appeal from the dismissal of his petition for writ of habeas corpus relief.

ANALYSIS

On appeal, Petitioner argues that the habeas corpus court erred in summarily dismissing his petition. The determination of whether to grant habeas corpus relief is a question of law. *See Hickman v. State*, 153 S.W.3d 16, 19 (Tenn. 2004). As such, we will review the habeas corpus court's findings de novo without a presumption of correctness. *Id.* Moreover, it is the petitioner's burden to demonstrate, by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000).

Article I, section 15 of the Tennessee Constitution guarantees an accused the right to seek habeas corpus relief. *See Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). In other words, habeas corpus relief may be sought only when the judgment is void, not merely voidable. *See Taylor*, 995 S.W.2d at 83. "A void judgment 'is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired.' We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal." *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000) (quoting *Taylor*, 955 S.W.2d at 83).

However, if after a review of the habeas petitioner's filings the habeas corpus court determines that the petitioner would not be entitled to relief, then the petition may be summarily dismissed. T.C.A. § 29-21-109; *State ex rel. Byrd v. Bomar*, 381 S.W.2d 280 (Tenn. 1964). Further, a habeas corpus court may summarily dismiss a petition for writ of habeas corpus without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. *Passarella v. State*, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994), *superceded by statute as stated in State v. Steven S. Newman*, No. 02C01-9707-CC-00266, 1998 WL 104492, at *1 n.2 (Tenn. Crim. App., at Jackson, Mar. 11, 1998).

The procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. *Summers v. State*, 212 S.W.3d 251, 260 (Tenn. 2007); *Hickman*, 153 S.W.3d at 19-20; *Archer*, 851 S.W.2d at 165. For the benefit of individuals such as Petitioner, our legislature has explicitly laid out the formal requirements for a petition for a writ of habeas corpus at Tennessee Code Annotated section 29-21-107:

(a) Application for the writ shall be made by petition, signed either by the party for whose benefit it is intended, or some person on the petitioner's behalf, and verified by affidavit.

(b) The petition shall state:

(1) That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and place where restrained, mentioning the name of such person, if known, and, if unknown, describing the person with as much particularity as practicable;

(2) The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal process, a copy thereof shall be annexed, or a satisfactory reason given for its absence;

(3) That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best of the applicant's knowledge and belief; and

(4) That it is the first application for the writ, or, if a previous application has been made, a copy of the petition and proceedings thereon shall be produced, or satisfactory reasons be given for the failure so to do.

A habeas corpus court “properly may choose to summarily dismiss a petition for failing to comply with the statutory procedural requirements.” *Summers*, 212 S.W.3d at 260; *See also Hickman*, 153 S.W.3d at 21. Further, in *Summers*, our supreme court explained:

In the case of an illegal sentence claim based on facts not apparent from the face of the judgment, an adequate record for summary review must include pertinent documents to support those factual assertions. When such documents from the record of the underlying proceedings are not attached to the habeas corpus petition, a trial court may properly choose to dismiss the petition without the appointment of counsel and without a hearing.

212 S.W.3d at 261.

In the case herein, Petitioner failed to adhere to the mandatory statutory requirements for a petition for writ of habeas corpus. The petition states that this is Petitioner's first petition for habeas corpus relief. As stated above, this is not the case as there has been a direct appeal from a previous petition for habeas corpus relief. *See Jackie F. Curry*, 2005 WL 927158, at *1. Petitioner has failed to attach a copy of his previous petition for habeas corpus relief to his current petition and has failed to give satisfactory reasons for his failure to do so. This is a requirement under the mandatory procedures set out in Tennessee Code Annotated section 29-21-107(b)(4). The failure to attach a copy of a prior petition for habeas corpus relief is reason in and of itself to dismiss the petition. *See Summers*, 212 S.W.3d at 260.

Even if Petitioner had complied with the statutory requirements, it was still appropriate for the habeas corpus court to summarily dismiss the petition for the following reasons.

Petitioner first argues that he should receive habeas corpus relief because his indictments were invalid for the above-stated reasons. A valid indictment is essential to vest jurisdiction in the convicting court and, therefore, an indictment that is so defective that it fails to vest jurisdiction may be challenged in a habeas corpus proceeding. *State v. Wyatt*, 24 S.W.3d 319, 320-23 (Tenn. 2000). Our supreme court has held that an indictment meets constitutional requirements if it provides sufficient information (1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy. *State v. Hill*, 954 S.W.2d 725, 727 (Tenn. 1997). In addition, an indictment must state the facts of the offense in ordinary and concise language. *See T.C.A. § 40-13-202*. Our supreme court has also stated that an indictment that refers to the statute which defines the offense is sufficient and satisfies all constitutional and statutory requirements. *See State v. Sledge*, 15 S.W.3d 93, 95 (Tenn. 2000); *see also Ruff v. State*, 978 S.W.2d 95, 100 (Tenn. 1998). The indictments complained of read, in pertinent part, as follows:

[Petitioner] . . . did unlawfully, feloniously and knowingly sexually penetrate [the victim] by placing his penis in the vagina of [the victim] and did cause bodily injury to [the victim], in violation of T.C.A. § 39-13-502, and against the peace and dignity of the State of Tennessee.

SECOND COUNT:

. . . [Petitioner] . . . did unlawfully, feloniously and knowingly sexually penetrate [the victim] by placing his penis in the mouth of [the victim] and did cause bodily injury to [the victim], in violation of T.C.A. § 39-13-502, and against the peace and dignity of the State of Tennessee.

THIRD COUNT:

... [Petitioner] ... did unlawfully, feloniously and knowingly sexually penetrate [the victim] by placing his penis in the anal opening of [the victim] and did cause bodily injury to [the victim], in violation of T.C.A. § 39-13-502, and against the peace and dignity of the State of Tennessee.

The indictments set forth both the elements of the offense and the statute which defines the offense. Therefore, it is clear the indictment is sufficient to vest jurisdiction in the convicting court. *See Sledge*, 15 S.W.3d at 95; *State v. Carter*, 988 S.W.2d 145, 158 (Tenn.1999); *Ruff*, 978 S.W.2d at 100; *State v. Hill*, 954 S.W.2d at 728.

Therefore, Petitioner's first three issues attacking the validity of his indictments are without merit.

Petitioner also argues that he is afforded habeas corpus relief because the trial court constructively altered the charging terms of the indictment through the jury instructions. This Court has repeatedly found that erroneous jury instructions cannot form the basis for habeas corpus relief. *See Ronald Eugene Gilmore v. Kenneth Locke, Warden*, No. M2005-01235-CCA-R3-HC, 2006 WL 1097493, at *4 (Tenn. Crim. App., at Nashville, Mar. 30, 2006) ("Erroneous jury instructions meet none of the . . . requirements for habeas corpus relief. The only method of collaterally attacking the judgment because of constitutional deprivations occasioned by erroneous jury instructions is by petition for post conviction relief.") (quoting *Willie Edward Thornton v. Fred Raney, Warden*, No. 02C01-9302-CC-00025, *2 (Tenn. Crim. App., at Jackson, Jan. 26, 1994), *perm. app. denied* (Tenn. May 23, 1994)); *John Haws Burrell v. Howard Carlton, Warden*, No. E2004-01700-CCA-R3-HC, 2005 WL 544732, at *2 (Tenn. Crim. App., at Knoxville, Mar.8, 2005) (concluding that petitioner's argument that trial court provided erroneous instructions to jury, even if true, "would merely render the convictions voidable, not void"), *perm. app. denied* (Tenn. June 20, 2005); *Vance McCaslin v. State*, No. 01C01-9611-CC-00480, 1998 WL 44919, at *1 (Tenn. Crim. App., at Nashville, Feb.5, 1998), *perm. app. denied* (Tenn. Nov. 9, 1998) ("As a general rule, neither erroneous jury instructions nor the ineffective assistance of counsel entitle a petitioner to habeas corpus relief. Even if taken as true, such allegations only render a conviction voidable, not void.").

This issue is without merit.

Petitioner argues that his convictions are void because the aggravated rape statute is unconstitutional. Petitioner argues that the statute is unconstitutional because the statute does not require proof of force or nonconsent and provides that aggravated rape may be proven by sexual penetration accompanied by bodily injury. Petitioner argues in his petition that both "force and coercion were issues directly implicated by the evidence." Accordingly, this issue appears to be partly one of sufficiency of the evidence to support his conviction. This is not a cognizable issue for habeas corpus relief. Insufficient evidence is not a proper basis for habeas corpus relief in that it

does not render his convictions void but merely voidable. *See Gant v. State*, 507 S.W.2d 133, 136 (Tenn. Crim. App. 1973). Petitioner also argues in this section that the statute's failure to require force as an element makes the statute unconstitutional. This argument appears to actually be a due process argument because the aggravated rape statute which provides for a conviction without the requirement of force or coercion would make it unclear as to what acts the statute prohibits. However, due process claims are not cognizable claims for habeas corpus relief. *Bobby James Moseley v. Wayne Brandon, Warden*, No. M2006-02398-CCA-R3-HC, 2007 WL 1774309, at *5 (Tenn. Crim. App., at Nashville, June 20, 2007), *perm. app. denied* (Tenn. Sept. 17, 2007).

This issue is also without merit.

Petitioner argues that the proof at trial did not support the jury's conclusion that he engaged in a substantial step to complete the crime. This argument, as the habeas corpus court stated, is an attack on the sufficiency of the evidence. As we stated above, insufficient evidence is not a proper basis for habeas corpus relief. *See Gant*, 507 S.W.2d at 136. Moreover, this Court previously reviewed this issue on direct appeal and concluded that there was sufficient evidence to support his convictions. *See State v. Jackie F. Curry*, No. E2000-02475-CCA-R3-CD, 2001 WL 872789, at *4-5 (Tenn. Crim. App., at Knoxville, Aug. 2, 2001), *perm. app. denied* (Tenn. Nov. 5, 2001).

Petitioner's final issue is that the trial court did not have jurisdiction to revoke the community corrections sentence he was serving at the time of the incident. From what we can glean from the record, Petitioner was on probation for another offense at the time of the incident in question. After reading this Court's opinion on direct appeal, we have discovered that Petitioner had a previously imposed sentence of eight years for the sale of cocaine. *Jackie F. Curry*, 2001 WL 872789, at *5. The sentences imposed for the incident in question were ordered to be served consecutively to his previously imposed eight-year sentence. *Id.* The record in the case sub judice includes the trial court's revocation of Petitioner's probation filed March 16, 2000. The revocation order states that his probation is revoked and that the prior judgment of the trial court will be put into full force and effect. The judgment, as related by the revocation order, states that the judgment was entered on January 25, 2000, and the eight years were to expire on January 25, 2008.

There is more than one reason that Petitioner's issue is without merit. Initially, we point out that he is attacking a completely different conviction in this issue. He argues that the trial court erred in revoking probation, the revocation of the probation is connected to the case at hand only because the current case caused the revocation. He has included no other documents, other than the revocation order, with regard to the separate conviction. He has not met the statutory requirements with regard to this conviction. *See Summers*, 212 S.W.3d 260. Therefore, we cannot address this issue as an attack on the judgment underlying the probation and subsequent revocation.

In addition, any arguments concerning the application of this prior conviction to enhance his sentence are now moot. According to the revocation order, Petitioner's eight-year sentence was to expire on January 25, 2008, and from what we can tell that does not include fifty-seven days of jail credit referenced in the revocation order. This case was assigned to this Court's docket to be heard

on March 25, 2008. By the time this case was heard by the Court, Petitioner's sentence should have already expired according the record we have on appeal. Therefore, this issue is moot.

The habeas corpus court was correct in its summary dismissal of the petition for habeas corpus relief.

CONCLUSION

For the foregoing reasons, we affirm the decision of the habeas corpus court.

JERRY L. SMITH, JUDGE